No. 80672-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY NELSON, and the marital community composed of LARRY and BARBARA NELSON

Respondents,

v.

WESTPORT SHIPYARD, INC., a Washington corporation, J. ORIN EDSON, individually and his marital community composed of ORIN and CHARLENE EDSON; DARYL WAKEFIELD, individually, and his marital community composed of DARYL and KIM WAKEFIELD

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals was correct in its decision upholding Larry Nelson's right to jury trial on his employment claims, his minority shareholder causes of action and the enforceability of the shareholders' agreement. Petitioners have provided this Court with no reason to justify review of the Court of Appeals' decision. Further, under the specific and narrow language in the shareholders' agreement, an arbitrator is not given authority to determine issues of minority oppression, unconscionability, duress, or general enforceability under state contract law. That narrow provision also does not provide for arbitration of the factual issues underlying the shareholder and employment claims, which is truly what petitioners have been relentlessly attempting to do. If valid, the shareholders' agreement merely addresses the methodology and formula for valuation of shares if a buy-back is triggered. As the Courts below recognized, it does not cover, touch, or concern Mr. Nelson's employment relationship or the duties owed to Mr. Nelson as a minority shareholder. The Court of Appeals properly ruled that petitioners' position was not supported by the law, and more importantly, it was not supported by the facts. This Court should, therefore, deny the Petition for Review.

II. RESTATEMENT OF ISSUE

Whether this Court should decline to review the Court of Appeals' decision that the court not an arbitrator is to decide the enforceability of the shareholders' agreement where the arbitration provision is narrow, and only relates to the share value if a buy-back is triggered; and where it does not include, address or discuss Ms. Nelson's employment relationship or the duties owed to Mr. Nelson as a minority shareholder?

III. RESTATEMENT OF THE CASE

A. Factual Background.

Westport Shipyard, Inc., was started by Rick and Randy Rust in 1978 and has been in the business of manufacturing boats ever since. CP 110. In 1983, Larry Nelson began working for Westport as a laborer on the laminator line. He stayed with Westport for his career, and worked his way up to being a key executive. CP 109. Several times, Mr. Nelson contemplated leaving for other valuable opportunities, but he was promised an ownership opportunity and just cause employment. CP 18. After Orin Edson became a part owner of Westport, he specifically made numerous representations and promises to Mr. Nelson, and only later did Mr. Nelson learn they were misrepresentations. CP 329-332. However, based on the representations, Mr. Nelson stayed with Westport, purchased

shares and became the Vice President and Chairman of the Board of this closely held, valuable company. CP 18, 19, 110.

Orin Edson was initially brought into the company by the Rust brothers in 1996 as a one-third (1/3) owner. CP 18. Gradually, Mr. Edson exerted powerful financial control over the other shareholders. CP 19. He drove wedges between the owners, manipulated them to do his will, and used his position of total financial control, as a major shareholder and the sole construction lender and financier, through his company, Pacific Marine Management, to coerce other shareholders to do his bidding. CP 333. Mr. Edson used threats to terminate and destroy their livelihood, among other acts of coercion and duress, in order to force them to vote how he wanted and do what he said. CP 333-334.

Mr. Edson had brought Daryl Wakefield into the company management and wanted to make him a shareholder. CP 111-112. By this time, no shareholder was in a position to refuse his demands. The 2004 Shareholders Agreement was mandated by Mr. Edson to accomplish this sale of shares. And, around this time, after several years of difficulties, the remaining Rust brother decided to sell his interest to Mr. Edson. CP 19.

Although Mr. Edson was now the majority shareholder, Mr. Nelson planned and intended to continue with Westport because he

had many years left prior to retirement and he loved his work and his employees. Earlier, Mr. Edson had represented and promised that Mr. Nelson could work until retirement, that they would grow the company as partners, and that his ownership would be worth more than book value. CP 331.

On April 29, 2005, during the middle of a business seminar, Mr. Nelson experienced a medical emergency and was transported to the hospital by ambulance. CP 20. Within a few days, for the first time Mr. Edson approached Mr. Nelson about forced early retirement. *Id.* Two days later, Mr. Edson faxed Mr. Nelson a letter stating in relevant part that it would be "best" if he "would retire" "considering [his] health problems," "some known, some unknown." *Id.* This letter is a *per se* violation of Washington employment anti-discrimination laws. Shortly thereafter, Mr. Nelson advised Mr. Edson that he did not intend to retire, that he would continue to work full-time for Westport, and that he had no medical work restrictions. *Id.*

The next day, May 18, 2005, Mr. Nelson was informed in writing that his "presence is not required nor allowed at Westport Shipyard facilities." CP 20. He was told to leave the premises and that he had until June 16, 2005 to resign under their terms or else he would be fired. *Id.*

On May 26, 2005, all Westport employees were informed that Mr. Nelson was no longer working at the company. *Id.*

On June 17, 2005, Mr. Nelson was notified that the Board of Directors had terminated his employment at Westport. This board meeting was not properly noticed, in violation of the corporation's by-laws. CP 21. Mr. Wakefield, now President of Westport, advised Mr. Nelson that Westport would be purchasing his shares pursuant to the 2004 Shareholders Agreement, which provided that the buy-back price is 1.5 times the book value as reported in the last audited financial statement. However, the amount offered as the buy-back price to Mr. Nelson was based on a lower or incorrect book value. And, although petitioners claimed that the purchase price was "tendered" to Mr. Nelson, there has been no such tender – no unrestricted deposit of any kind.

The 2004 Shareholders Agreement provides, in pertinent part, that:

. . . .

> 2.3.3 upon the unresolvable difference between shareholders (a majority vote of the shares owned by the then current shareholders of record shall determine which shareholder shall be bought out); or
>
> 2.3.4 upon the termination/resignation of employment; death; or incapacity of any shareholder;

> the Corporation shall have the option to purchase any or all of the shares held by the shareholder in the Corporation.

CP 45. It also provides that the corporation must pay 1.5 times the book value of the stock as determined in the last audited financial statement. CP 46. The three earlier buy-sell agreements have similar provisions, except the re-purchase price is book value. CP 56-66.

The 2004 Shareholders Agreement contains a narrow arbitration clause:

> 6.5 Arbitration. In the event of any disputes among any of the parties *arising out of this Agreement*, then such disputes shall be submitted to arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. . . . .

CP 52 (emphasis added).

B. Procedural Background.

Mr. Nelson filed suit on June 24, 2005. CP 1. An amended complaint was filed on July 15, 2005. CP 16. On August 5, 2005, Mr. Nelson filed a Demand for Jury Trial pursuant to RCW 7.07.040, on the "validity or existence of the arbitration agreement of the 2004 Shareholders Agreement or the failure to comply therewith." CP 563. In his lawsuit, Mr. Nelson brings claims for disability discrimination in violation of Washington's Law Against Discrimination, Chapter 49.60 RCW, breach of implied contract to terminate only for just cause,

wrongful withholding of wages, breach of fiduciary duty, minority shareholder oppression, and tortious interference with business expectancies. He also seeks declaratory relief that the Shareholders Agreement does not control or limit his claims or damages, and that it is void and unenforceable, based on misrepresentations, duress, coercion, failure of consideration and breaches. CP 23-27.

On August 8, 2005, Westport[1] moved to compel arbitration of all shareholder claims, including the Fourth and Sixth Causes of Action and many of the shareholder-related factual allegations in Section III of the Complaint. CP 30. In his letter opinion issued October 31, 2005, Judge McCauley denied Westport's motion to stay litigation and compel arbitration, stating:

> There is no indication that the parties agreed to arbitrate the type of claims set forth in the amended complaint. One cause of action challenges the validity of the Shareholders Agreement. I do not know if the claim has any merit, but I do conclude that such a claim is not covered by the arbitration clause in the Shareholder Agreement.

CP 132. An Order later entered on November 10, 2005, states that "it is hereby ordered that at this stage of the litigation, Defendants' Motion is denied." CP 134. On December 6, 2005, Westport filed a "motion for

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[1] "Westport" is used for the remainder of this brief in lieu of "petitioners," and is intended to apply to all petitioners. If the name of the individual petitioner is material, the individual's name will be used.

clarification." CP 141. Westport acknowledged it was a "second motion to compel." VRP (Jan. 3, 2006) 2:6. This motion was also denied. *Id.* at 8.

Westport elected not to appeal the November 2005, or the January 2006 determinations denying arbitration as to enforceability of the Agreement or its claims of breach. Instead, it accepted the Court's decision without appellate challenge, and began to ferociously litigate. It requested relief from the Superior Court in the form of dispositive motions to dismiss claims, motions to compel discovery and production, CP 571, 589, commissions for out-of-state depositions, and even a motion for sanctions. Significantly, on March 3, 2006, Westport filed a motion for summary judgment to dismiss the claim for punitive damages, CP 598-606, which was granted. CP 648. Even more significantly, on March 21, 2006, Westport filed a Motion for Partial Summary Judgment Re Declaratory Relief, seeking a summary determination that the Shareholders Agreement is valid and enforceable – the very claim Westport argues is subject to arbitration. CP 235. This motion was denied on August 9, 2006. CP 501.

Westport filed yet another motion to compel arbitration on April 10, 2006. CP 390. This motion, like the others, was denied through a memorandum opinion issued July 21, 2006. CP 498. The trial court simply reiterated "[i]n the present case, I ruled that the arbitration clause is narrow, and the parties did not agree to arbitrate the validity of the

Shareholders Agreement." *Id.* (emphasis added). Although Westport cited *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d. 1038 (2006), Judge McCauley held that *Buckeye* was inapplicable because the parties' agreement in this case, and unlike *Buckeye*, was narrow and it did not give the arbitrator the authority to determine the agreement's enforceability. The Court entered an Order again denying Westport's motion to compel arbitration on August 10, 2006. CP 503. Westport then filed a notice of appeal from the denial of arbitration on September 1, 2006 – over ten (10) months after the trial court's October 31, 2005, ruling and seven (7) months after the trial court's January 3, 2006, ruling. CP 506.

Prior to the Court of Appeals decision on the merits, Mr. Nelson filed a motion to dismiss the appeal arguing that Westport waived its right of immediate interlocutory appeal by failing to appeal when its first motion to compel arbitration was denied and more importantly, by waiting until after the trial court denied its motion for summary judgment on the enforceability of the agreement. Westport actually submitted to the trial court the very claim it still asserts is arbitrable. The Court of Appeals' Commissioner denied Mr. Nelson's motion, and the Court of Appeals affirmed that denial on the motion to modify.

On August 7, 2007, the Court of Appeals issued its decision on the merits. It determined that the 2004 Shareholders Agreement did not

encompass disputes about the validity, enforceability, or scope of the agreement, nor did the agreement cover disputes over fiduciary breach or minority shareholder oppression. *Nelson v. Westport*, ___ Wn. App. ___, 163 P.3d 807, 2007 WL 2274469 at *1 (August 7, 2007). In reaching these holdings, the Court observed that "whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties." *Id.* at * 7. The Court ultimately remanded for trial the enforceability of the agreement and Mr. Nelson's employment and on shareholder claims. The Court also ruled that if the agreement is held enforceable and there is a dispute over the buy-back value of the shares, then such value issue is to be determined through arbitration. *Id.* at * 8. Westport filed a Petition for Review, and this Answer follows.

IV. ARGUMENT AND AUTHORITY

A. Westport Fails to State a Basis for Review.

Westport argues for acceptance of review under RAP 13.4(b)(4), which provides that review will be accepted only "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Westport, however, fails to establish a basis for review on this ground.[2] As recognized by both the trial court and the Court of Appeals, the decision in this case turns on the very particular and

[2] Because Westport does not seek review under RAP 13.4(b)(1)-(3), these basis for review are not at issue and not addressed in this Answer.

specific language presented here, which is narrow and does not give authority to an arbitrator to determine whether the agreement is enforceable under state contract law principles. The provision at issue here is clearly unique to this case. Therefore, this case will not impact anyone other than the immediate parties to this litigation.[3] Because there is no "substantial public interest" impacted, there is no basis for further appellate review.

B. There is No "Substantial Public Interest" in Compelling Arbitration Over Issues the Parties Did Not Agree to Arbitrate.

Throughout the Petition for Review, Westport quotes and relies on Washington's "strong public policy favoring arbitration." Petition at 11. In doing so, however, Westport ignores the more important public policy upon which the preference for arbitration is grounded: Arbitration is a matter of contract and parties will not be compelled to submit disputes to arbitration unless there is an arbitration agreement covering the particular dispute. To hold otherwise would be to undermine the entire contractual basis for arbitration.

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[3] Both the Grays Harbor Superior Court and the Court of Appeals determined that the arbitration clause at issue in this case was "narrow." *Nelson v. Westport*, 2007 WL 2274469 at * 5. Westport did not assign error to this factual determination. In fact, Westport concedes in the petition for review that the arbitration agreement is "narrow." Petition at 15. The factual distinction between a "narrow" arbitration clause and a "broad" arbitration clause is critical in determining the scope of arbitration. See *Mediterranean Enterprises Inc., v. Ssangyong Corp,* 708 F.2d 1458, 1464 (9th Cir. 1983).

Arbitration is a contractual remedy, freely bargained for, that provides extrajudicial means for resolving disputes. *Thorgaard Plumbing & Heating Co. v. County of King,* 71 Wn.2d 126, 131, 426 P.2d 828 (1967). The "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Kamaya v. American Property Consultants,* 91 Wn. App. 703, 712, 959 P.2d 1140 (1998); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). The scope or arbitrability of a dispute is controlled by the language of the contract and is to be determined by the Court.

Under both state and federal case law, when determining whether the parties have agreed to arbitrate a particular issue, the Court must apply ordinary state-law principles that govern the formation and validity of contracts. *First Options of Chicago Inc. v. Kaplan,* 514 U.S. 938, 944 (1995). In Washington, this includes the application of the context rule. *Tjart v. Smith Barney, Inc.,* 107 Wn. App. 885, 895, 28 P.3d 823 (2001).

Where the parties dispute whether an arbitration clause applies to a particular type of controversy, the question is for the Court. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83 (2002). In *Howsam*, the Supreme Court held:

> This Court has determined that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Nav. Co.*,

> 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960); see also *First Options*, 514 U.S. at 942-943. Although the Court has also long recognized and enforced a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, i.e., the "question of arbitrability," is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) (emphasis added).

Id.

Decisions issued after *Buckeye*, 546 U.S. 440, affirm this black letter law. For instance, in *Goodrich Cargo Sys. v. Aero Union Corp.*, 2006 U.S. Dist. LEXIS 93680 (D. Cal. December 14, 2006) the court held that "a federal court must review the contract at issue to determine whether the parties have each agreed to submit a particular dispute to arbitration." *See also*, *Slatnick v. Deutsche Bank AG*, 2006 U.S. Dist. LEXIS 94836 (D. Cal. March 15, 2006) (holding that courts are only to "compel arbitration if the court is satisfied the claim at issue falls within the scope of a valid, enforceable agreement among the parties to arbitrate the claim.").[4]

[4] Respondents recognize that Washington appellate decisions that are non-published are not to be cited, nor considered precedential. However, Washington courts have

In Mr. Nelson's case, the trial court determined that the agreement did not provide the arbitrator with authority to determine the enforceability of the agreement. CP 498. Judge McCauley specifically held that "the arbitration clause is narrow, and the parties did not agree to arbitrate the validity of the Shareholders Agreement." *Id.* This factual determination was affirmed by the Court of Appeals. Because the unanimous decision below affirming the trial court is based on a factual determination well supported by the evidence in the case, there is no substantial public interest justifying review by the Supreme Court.

C. The Lower Courts All Properly Applied *Buckeye.*

Both the trial court and the Court of Appeals correctly determined that *Buckeye* was inapplicable because the contract there expressly provided that the arbitrator would determine issues of the contract's enforceability, and, in this case, the 2004 Shareholders Agreement was extremely narrow and did not provide the arbitrator with this authority.

Unlike this case, the *Buckeye* case, a class action, involved a very broad arbitration clause, not like the narrow one here, and the clause specifically provided that disputes as to the validity, enforceability or

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considered non-published federal court decisions. See, e.g., *Salter v State,* 151 Wn.2d 148, 159-60, 86 P.3d 1159 (2004)(citing a 2001 case, *Hernandez v City of Chicago* on Westlaw and Lexis.).

scope of the arbitration clause shall be resolved by binding arbitration.

There, the arbitration clause provided, in relevant part, that:

> 1. *Arbitration Disclosure.* By signing this Agreement, you agree that if a dispute **of any kind** arises out of this Agreement or your application therefore or any instrument **relating thereto**, then either you or we or third-parties involved can choose to have that dispute resolved by binding arbitration as set forth in Paragraph 2 below . . . .
>
> 2. *Arbitration Provisions.* **Any claim, dispute, or controversy . . . arising from or relating to this Agreement . . . or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement** (collectively 'Claim'), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration . . . . This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ('FAA'), 9 U.S.C. Sections 1-16. The arbitrator shall apply applicable substantive law constraint *[sic]* with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized by law . . . .

Buckeye, 546 U.S. at 442-443 (emphasis added in bold).

The contract in *Buckeye* is much different than the arbitration clause in this case. The *Buckeye* agreement specifically required that the arbitrator decide questions about the scope, validity and enforceability of the agreement. The arbitration agreement in this case does not include such broad language.

At the trial court level, Judge McCauley's decision correctly distinguished *Buckeye*. There, the court ruled as follows:

> The recent case of *Buckeye Check Cashing Inc. v. Cardegna*, ___ U.S. ___, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) did not change the law in a way that would affect my prior rulings on arbitration. The *Buckeye* Court relied on prior case law containing broad arbitration clauses. Similarly, the *Buckeye* Court interpreted a broad arbitration clause. In the present case, I ruled that the arbitration clause is narrow, and the parties did not agree to arbitrate the validity of the Shareholders Agreement.

CP 498.

The Court of Appeals affirmed on the same grounds as the trial court. In relevant part, the Court of Appeals held as follows:

> Unlike the arbitration provision in *Buckeye*, the 2004 shareholders agreement arbitration clause does not expressly encompass disputes about the validity, enforceability, or scope of the arbitration clause in particular. In our view, this distinction is critical to our holding that *Buckeye* does not apply here.

Nelson, 2007 WL 2274469 at * 5.

The arbitration agreement at issue in *Buckeye* specifically provided the arbitrator with the authority to determine "the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement." As discussed above, parties are not obligated to arbitrate disputes that the courts determine are not subject to the arbitration agreement. Because

Buckeye is factually distinct in this critical manner, there was no error and there is no basis for review.

D. Mr. Nelson's Employment and Shareholder Claims Are Not Subject to Arbitration.

Just as with the question of enforceability of the 2004 Shareholders Agreement, the trial court and Court of Appeals also correctly determined that Mr. Nelson's minority shareholder claims and employment claims are not subject to arbitration. The shareholder agreement does not reference, discuss, or relate to Mr. Nelson's employment or the duties owed to Mr. Nelson as a minority shareholder. CP 45-46. Because these claims are not covered by the agreement, they are not subject to arbitration and there is no basis for review.

E. Westport Waived its Right to Appeal by Failing to File a Timely Notice of Appeal and by Waiting Until the Trial Court Ruled on the Question at Issue.

This Court should not grant Westport's Petition for Review because the unique and narrow provision in the 2004 Shareholders Agreement between the parties controls and there is no substantial public interest presented. Respondents do not believe that this Court should accept review. However, in the event that this Court does accept review, then the Court should also review the issue of whether Westport waived is right to immediate appeal of a denial of a motion to arbitrate by failing to file a notice of appeal after the first motion to compel was denied and by

waiting until after significant discovery and after the trial court denied its summary judgment motion regarding the enforceability of the shareholders' agreement. Review of these procedural issues would be appropriate under RAP 13.4(b)(1) and 13.4(b)(2) because the decision below is incompatible with decisions from both this Court and the Court of Appeals. *Herzog v. Foster & Marshall,* 56 Wn.2d 437, 440, 443, 783 P.2d 1124 (1989); *Naches Valley School District v. Cruzen,* 54 Wn. App 388, 775 P.2d 960 (1989).

Regarding this first issue, the Court of Appeals erred in considering the merits of the appeal because Westport forfeited any right of immediate appeal of the denial of its motion to compel arbitration because it did not timely appeal from the November, 2005, order. The time for filing a Notice of Appeal is a jurisdictional step. *Mallot v. Randall,* 8 Wn. App. 418, 506 P.2d 1296 (1973). The appeal must be perfected in the manner and time required by court rules for the appellate court to have jurisdiction. The deadlines for filing an appeal are strictly construed. RAP 18.8. In Washington, an order denying arbitration must be immediately appealed, because the denial of such motion terminates the action for arbitration, and the benefits of arbitration are irretrievably lost without an immediate appeal. *Herzog,* 56 Wn.2d at 437; *Stein v. Geonerco, Inc.,* 105 Wn. App. 41, 44, 17 P.3d 1266 (2001). The reason for the immediate appeal is to prevent the delays, costs and expenses of

extended judicial proceedings from defeating the savings associated with arbitration. Here, however, Westport did not immediately appeal and instead, fully engaged in extensive discovery, discovery motions, and substantive motions to dismiss claims and to seek sanctions. Westport filed its notice of appeal from the denial of arbitration on September 1, 2006, well past the 30-day time period. CP 506.

In addition to forfeiting the right of appeal by waiting over 30 days from the November 10, 2005 order, Westport's conduct in the litigation subsequent to entry of the November 2005, order constitutes a waiver of any claimed right to arbitrate substantive issues which were ruled upon by the trial court. Instead of seeking review, Westport participated in the litigation through extensive discovery and even brought an affirmative motion for partial summary judgment on the very issue that it claimed was subject to arbitration. CP 235. Under such circumstances, Westport has engaged in conduct in the litigation, without filing a timely appeal from the outset, which is inconsistent with any claimed right to arbitrate that issue. A party waives the right to seek arbitration by participating in legal action involving the substance of the issue. *Naches Valley School District,* 54 Wn. App 388 (motion for summary judgment on liability indicated intent to proceed with the action rather than seek arbitration); *Kinsey v. Bradley,* 53 Wn. App. 167, 765 P.2d 1329 (1989)(party engaged in extensive motion practice to dismiss claims without seeking arbitration).

By proceeding extensively in the litigation without filing a notice of appeal, and then specifically filing a motion for partial summary judgment on the claim it asserts is subject to arbitration, Westport indicated its intent to proceed with the civil action, and waived its right to claim arbitration as to the enforceability of the shareholder agreement. *Lake Washington School Dist. v. Mobile Modules,* 28 Wn. App. 59, 61, 621 P.2d 791 (1980). To rule otherwise would be to allow a party to take a shot at its claim with the court, and then, if the court rules against the party, take a second shot at the same issue in arbitration. Simply put, after the fact forum shopping in not allowed under Washington law.

V. CONCLUSION

For the reasons stated above, Respondents respectfully request that this Court deny the Petition for Review.

Dated this 8th day of October, 2007.

Respectfully submitted,

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